1   IN THE SUPREME COURT OF THE UNITED STATES

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3   CORY R. MAPLES,   :

4   Petitioner   :

5   v.   :   No. 10-63

6   KIM T. THOMAS, INTERIM   :

7   COMMISSIONER, ALABAMA DEPARTMENT   :

8   OF CORRECTIONS   :

9   - - - - - - - - - - - - - - - - - x

10   Washington, D.C.

11   Tuesday, October 4, 2011

12

13   The above-entitled matter came on for oral

14   argument before the Supreme Court of the United States

15   at 10:03 a.m.

16   APPEARANCES:

17   GREGORY G. GARRE, ESQ., Washington, D.C.; on behalf of

18   Petitioner.

19   JOHN C. NEIMAN, JR., ESQ., Solicitor General,

20   Montgomery, Alabama; on behalf of Respondent.

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1   P R O C E E D I N G S

2   (10:03 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear argument

4   first this morning in Case 10-63, Maples v. Thomas.

5   Mr. Garre.

6   ORAL ARGUMENT OF GREGORY G. GARRE

7   ON BEHALF OF THE PETITIONER

8   MR. GARRE: Thank you, Mr. Chief Justice,

9   and may it please the Court:

10   Two factors distinguish this case from those

11   in which the Court has found cause lacking to excuse a

12   default: First, the State itself had a direct hand in

13   the extraordinary events leading up to the default in

14   this case; and, second, the actions of Maples's

15   attorneys, which rise to the level of abandonment, are

16   not attributable to Maples under agency law or other

17   principles that this Court has invoked in determining

18   when attorney conduct may be imputed to a client.

19   For either or both of those reasons, the

20   default at issue in this case is not fairly attributable

21   to Cory Maples, and the contrary decision of the

22   Eleventh Circuit should be reversed.

23   CHIEF JUSTICE ROBERTS: You talk about the

24   State's role. I assume that you're talking about there

25   is the failure to take action after the return of the

                                3

1 notices.

2   MR. GARRE: I think that -- that's right,

3 Mr. Chief Justice. I would couple that, though, with

4 the fact that the State initially set up a system for

5 the representation of indigent capital defendants that

6 relies extremely heavily on the good graces of

7 out-of-State counsel to represent indigent capital

8 defendants in Alabama.

9   CHIEF JUSTICE ROBERTS: Well, put -- putting

10 that -- that to one side, what if only one of the three

11 notices had been returned?

12   MR. GARRE: I think -- if only one from the

13 out-of-State pro bono counsel?   `

14   CHIEF JUSTICE ROBERTS: Right.

15   MR. GARRE: I think that would be a

16 different case. I think what's remarkable about this

17 case is you have both out-of-State attorneys, the

18 notices come back marked "Return to Sender -- Left Firm"

19 in an envelope, and the clerk does nothing. And what's

20 extraordinary about that, Mr. Chief Justice, is that the

21 system in this case relies on the out-of-State attorneys

22 to provide --

23   JUSTICE SCALIA: Who says so? Who says so?

24 Who says that they rely on -- you have a local attorney,

25 and you have to have a local attorney for the case,

4

1   don't you? And -- and you want us to believe that the

2   local attorney is -- has no responsibility for the case

3   at all? Is this really what the -- what the law

4   requires? I -- I think there is a serious ethical

5   obligation when he has the -- when he gets the notice.

6   He is one of the attorneys for your client. And he got

7   the notice, right? That one was not returned.

8   MR. GARRE: That's correct, Justice Scalia.

9   JUSTICE SCALIA: He failed to check with --

10   with the New York lawyers who were working with him.

11   Why is it -- why is the State responsible for that?

12   MR. GARRE: We have three points on the

13   local counsel, Your Honor. First, the record shows that

14   the notice is not attributable to Mr. Maples because Mr.

15   Butler had disclaimed any relationship apart from

16   facilitating the admission of out-of-State attorneys.

17   JUSTICE GINSBURG: Disclaimed to who? To --

18   I mean, how could a clerk be expected to know that the

19   local counsel really isn't taking any part? I mean --

20   so was the disclaimer to the clerk?

21   MR. GARRE: I think a -- a couple things on

22   the clerk's perspective. First, we do think that it was

23   well known in Alabama that, under this unique system,

24   out-of-State attorneys were doing all the work in these

25   cases, and local counsel were simply facilitating their

5

1   admission. Second, one of the --

2   JUSTICE KAGAN: Well, who says that, Mr.

3   Garre? I mean, is there anything in the record on that

4   point, on the Alabama system generally?

5   MR. GARRE: A couple of the things, Your

6   Honor. First, we do have the amicus briefs, which

7   discuss that anecdotally. I would say that the State of

8   Alabama in its brief in opposition to this Court a few

9   years back in the Barbour case specifically touted the

10   role of out-of-State attorneys under its system and, as

11   far as I could tell, didn't mention local counsel once.

12   So, I think it was fair to say that it's known that the

13   out-of-State attorneys here were doing all the work.

14   But even if the clerk --

15   JUSTICE SOTOMAYOR: You're begging the

16   question, which is how is the clerk supposed to know

17   this? This is a functionary in the clerk's office who

18   sends out notices, receives back mail that's not

19   returned. There has to be some local counsel that does

20   work.

21   MR. GARRE: Well --

22   JUSTICE SOTOMAYOR: How is he supposed to

23   know the difference between those that do and those that

24   don't?

25   MR. GARRE: What -- what -- I think the

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1   clerk would be imputed with knowledge, general knowledge

2   of the system. But beyond that, what the clerk know --

3   knew was this: He knew that two of the three notices

4   that went out were returned, both to the out-of-State

5   attorneys, which ought to be an extraordinary event in

6   the life of any court clerk.

7   JUSTICE SCALIA: But, you know, even if

8   local counsel is as you -- as you describe it, and

9   nothing in the record establishes it, even if he is a

10   functionary, surely the function would include when he

11   gets a notice, that he makes sure that the -- the people

12   who do the real work know about the notice.

13   MR. GARRE: Of course. But the point is --

14   JUSTICE SCALIA: He didn't perform that

15   function.

16   MR. GARRE: In this case, the local counsel

17   didn't perform as a mail drop, and that was

18   intentionally so. His own affidavit makes that clear.

19   And I think what's important is the State itself must

20   not have viewed --

21   JUSTICE KENNEDY: But he didn't have a mail

22   drop? I just didn't hear what you said.

23   MR. GARRE: My point was that ordinarily a

24   local counsel would serve as a mail drop; he would

25   forward notice. In this case, Mr. Butler made quite

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1   clear from the outset he was not even performing that

2   role. The role that he intentionally performed was to

3   admit out-of-State counsel and to let them do the work.

4   But the State itself --

5   JUSTICE SCALIA: To whom did he make that

6   clear? You said he made it clear at the outset. To

7   whom? And where is that in the record?

8   MR. GARRE: It's in his affidavit, Your

9   Honor, the petition appendix page 256.

10   JUSTICE SCALIA: His affidavit after --

11   after the fact, right?

12   MR. GARRE: That's right, Your Honor.

13   JUSTICE SCALIA: Did -- did he tell the

14   clerk of the court that that was the case?

15   MR. GARRE: He did not.

16   JUSTICE SCALIA: Yes, you know, I'm counsel

17   of record. He's the counsel of record, right? I'm

18   counsel of record, but I don't even do so much as to

19   forward notices to the guys that are doing the real

20   work? Did he tell the clerk that?

21   MR. GARRE: He did not tell the clerk --

22   JUSTICE SCALIA: That's extraordinary.

23   MR. GARRE: -- but the State itself, Your

24   Honor must not have viewed him as a meaningful player,

25   because when the default at issue in this case occurred,

8

1   the State sent a letter -- faxed it -- to Mr. Maples

2   directly on death row in Alabama, without --

3   JUSTICE GINSBURG: You said that even before

4   that. In the rule -- you said the Rule 32 -- didn't you

5   say something about -- the -- the notice that went from

6   the prosecutor to Maples did not go to the local

7   counsel, right?

8   MR. GARRE: The clerk sent out notices to

9   all three attorneys of record, the two out-of-State

10   counsel and Mr. Butler. Mr. Butler did receive the

11   notice. He didn't do anything, both because he hadn't

12   assumed any role beyond facilitating admission --

13   JUSTICE GINSBURG: Did the -- did the

14   prosecutor -- I'm not talking about the clerk now. The

15   prosecutor had a filing in connection with the Rule 32

16   motion. Did the prosecutor send that to, well,

17   everybody? Maples and everybody?

18   MR. GARRE: He did not. The State -- and

19   this is at page 26 of the joint appendix. The State

20   served it on his out-of-State counsel and not Mr.

21   Butler, his local counsel. And when the default

22   occurred, the State contacted Mr. -- Mr. Maples directly

23   in prison, which would have been unethical if the State

24   had known or believed that he was represented by

25   counsel.

9

 1   JUSTICE GINSBURG: But you seem not to rely

 2 on what the State as prosecutor did. It seemed to me

 3 the State as prosecutor was recognizing that Maples had

 4 no counsel; therefore, sent -- said you'd better file

 5 your habeas; this is how much time you have -- sent it

 6 just to him.

 7   MR. GARRE: I absolutely agree with you,

 8 Justice Ginsburg. I think that that is further evidence

 9 that everybody knew that Mr. Maples didn't have any

10 local counsel in any meaningful sense.

11   JUSTICE SCALIA: Where does the Constitution

12 say, by the way, that you have to give notice, that

13 every judicial action has to be noticed --

14   MR. GARRE: Well --

15   JUSTICE SCALIA: -- to the parties to the

16 case? The Federal rules don't -- don't require notice,

17 do they?

18   MR. GARRE: The Constitution doesn't say

19 that explicitly --

20   JUSTICE SCALIA: And the Federal rules don't

21 say it. You don't have to give notice in the Federal

22 rules, do you?

23   MR. GARRE: We think notice of a

24 postconviction order in a capital case would at least

25 implicate a due process interest in receiving notice,

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 1   that it's reasonable --

 2   JUSTICE SCALIA: Capital cases are

 3   different? If you're going to go to jail for life you

 4   -- you don't get notice, but if -- if it's a capital

 5   case --

 6   MR. GARRE: I think under the --

 7   JUSTICE SCALIA: No, I mean, it's either a

 8   rule for all criminal cases or it's not a rule.

 9   MR. GARRE: Well --

10   JUSTICE SCALIA: And if -- if it's a rule

11   for all criminal cases, the Federal rules are

12   unconstitutional, you're saying.

13   MR. GARRE: The Mullane case specifically

14   takes into account the interests of the individual

15   receiving notice. There could be no greater interest of

16   an individual than receiving notice in a capital case

17   where the individual's life is at stake. Ultimately we

18   don't think this Court has to find a constitutional

19   violation. It has to find that the event --

20   JUSTICE SCALIA: Once you're in court and

21   you have a lawyer, it's up to your lawyer to follow what

22   goes on in the court. That's the assumption of the

23   Federal rules. And it seems to me a perfectly

24   reasonable assumption. And I'm not about to hold that

25   -- that they are unconstitutional simply because an

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1   extraordinary requirement of notice, which is not

2   required by the Constitution, has gone awry.

3   MR. GARRE: Here Mr. Maples did not have an

4   attorney that was serving in an agency role in any

5   meaningful sense. That's laid out in Ms. DeMott's

6   amicus brief; it's laid out in our case. What's more is

7   the State didn't simply just, we think quite

8   unreasonably, rely on a role that local counsel was not

9   performing in Alabama --

10   CHIEF JUSTICE ROBERTS: What if -- but --

11   your case it seems to me turns critically on Butler's

12   role. How much, in addition to what he did or didn't

13   do, would he have to do to put him in a position where

14   he was in fact representing Maples in your view?

15   MR. GARRE: I think that the ordinary role

16   of local counsel, which would have been to, at a

17   minimum, forward notice in the proceeding, would be a

18   meaningful relationship. The relationship that -- that

19   Professor DeMott describes here is one of sub-agency.

20   And, in fact, if you look at the Alabama rules, they put

21   the onus on the out-of-State counsel to associate the

22   local counsel. That's at page 365 of the joint

23   appendix. The out-of-State counsel did that. Mr. --

24   Mr. Maples wasn't involved in that transaction.

25   JUSTICE ALITO: Where do we look -- where do

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1   we look to see that it's standard practice for local

2   counsel throughout the country to contact out-of-State

3   counsel when something like this is received? I

4   remember a case from the Federal system in which local

5   counsel appeared and did exactly what was done here,

6   moved the admission of an out-of-State criminal defense

7   attorney, who then tried the case for a year, got sick,

8   and the judge said to the local -- local counsel: Come

9   on in; you're going to take over this trial and try it

10   for the next 6 months. And the local counsel said:

11   Whoa, I only signed up to move the admission of this

12   fellow. The judge said: That's too bad; you're counsel

13   of record, and you have to take over the case.

14   I don't understand that what is alleged to

15   have occurred here is that far out of the ordinary.

16   MR. GARRE: I think Mr. Butler -- just

17   simply saying, I'm going to allow -- I'm going to

18   facilitate your out-of-State attorney to represent you,

19   but that's my role. He has, quote, unquote, "no role"

20   outside of that.

21   JUSTICE SCALIA: He can't define his role as

22   a lawyer. Once he appears before a court and says, I am

23   counsel of record, he has certain responsibilities.

24   It's not up to him to say what his responsibilities are.

25   MR. GARRE: Well, clearly that's right.

13

1   JUSTICE SCALIA: And if they don't extend

2   even to forwarding notice, even to making sure that the

3   people who were doing the legwork in the case know that

4   -- that the clock is running, my goodness, I can't

5   imagine what his responsibility is. It's not up to him

6   to define it.

7   MR. GARRE: That's exactly our point,

8   Justice Scalia, which is that he forswore any

9   responsibility. The lawyer in the Holland case just had

10 those responsibilities, too. He abandoned his client.

11 This -- what Mr. Butler here did here was inexcusable.

12   But there's another factor at play here, and

13 that's the confusion that the court itself affirmatively

14 created when it sent an order that, by its terms,

15 directed that all counsel of record receive it. And

16 that's what the order said; it's on page 225 of the

17 joint appendix. And --

18   JUSTICE BREYER: Before you get to the

19 court, could I ask you about what the State attorney,

20 the prosecuting attorney, knew? Did the prosecuting

21 attorney know that these two individuals from New York

22 were representing this person?

23   MR. GARRE: Certainly, it knew that they

24 were counsel of record in the proceeding. I'll let my

25 -- my friend answer that question. What we know,

14

1   though, is when the default occurred, it took the

2   extraordinary step of faxing a letter directly to Mr.

3   Maples in prison, which would have been unethical if it

4   believed he was represented by counsel.

5   JUSTICE BREYER: All right. So you think

6   you have -- in your view, the counsel of record knew

7   that these two people in New York were part of the

8   representation. Did the counsel -- I mean, not the

9   counsel of record; the counsel for the State.

10   Did the counsel know that they hadn't gotten

11   the notice?

12   MR. GARRE: Well, I don't want to speak for

13   my friend. I don't -- there's certainly nothing in the

14   record to -- to establish that they knew that these

15   out-of-State attorneys didn't get notice.

16   JUSTICE BREYER: Is there any reason to

17   think that the State attorney or whoever was prosecuting

18   thought that the local counsel was likely not to do

19   much?

20   MR. GARRE: Yes.

21   JUSTICE BREYER: Yes? Okay.

22   MR. GARRE: The very actions it took,

23   Justice Breyer.

24   JUSTICE BREYER: All right. Now, so it's

25   possible -- we'll find out later -- that the State --

1   the prosecuting attorney who works for the State knew

2   all those things: One, he's represented by counsel in

3   New York; two, they didn't get the notice; three, the

4   local attorney isn't going to do anything; and

5   conclusion: They likely knew he didn't get the notice,

6   but they are asserting that this is an adequate State

7   ground to bar him coming into habeas; is that the

8   correct posture of the case?

9   MR. GARRE: That's true, Justice Breyer.

10   JUSTICE BREYER: So, all we have to decide

11   is whether under these circumstances the State

12   attorney's knowledge of all those facts mean that the

13   State cannot assert this is an adequate State ground.

14   MR. GARRE: Right. And I think the State's

15   actions --

16   JUSTICE SCALIA: Do we know that he knew all

17   of those facts?

18   MR. GARRE: No, Justice Scalia --

19   JUSTICE SCALIA: Of course, we don't know

20   that.

21   MR. GARRE: But we know -- we know what

22   action it took, and that action was an action that

23   assumed that he didn't have meaningful counsel, or else

24   it would have been unethical.

25   JUSTICE KENNEDY: Let me ask you --

1   JUSTICE SOTOMAYOR: Counsel, can I --

2   JUSTICE KENNEDY: Let me ask you this, if I

3   may. I don't know if -- I don't think the briefs

4   covered it. It may be in there. Do you know, in

5   Alabama and/or nationwide, in how many capital cases

6   there is no appeal?

7   MR. GARRE: I don't know that, Justice

8   Kennedy. I think the Alabama system here created a

9   system in which it would allow for appeals, not only in

10   direct appeals, but postconviction proceedings. The

11   extraordinary -- there are several extraordinary

12   features of the Alabama system, and we think that

13   ultimately they helped to facilitate the extraordinary

14   and shocking events in this case.

15   CHIEF JUSTICE ROBERTS: What if -- the New

16   York lawyers did not abandon Mr. Maples prior to the

17   time that they left their law firm in New York, right?

18   MR. GARRE: That's right.

19   CHIEF JUSTICE ROBERTS: So, their conduct

20   prior to that time would be attributed to him, right?

21   MR. GARRE: I think that's right.

22   CHIEF JUSTICE ROBERTS: Right. Part of

23   their conduct was setting up their arrangement with Mr.

24   Butler where he would show up as counsel of record but

25   not really do anything. So, why aren't the consequences

                              17

1   of that arrangement attributed to Maples as well?

2   MR. GARRE: Well, I don't think they would

3   be attributed. I think what you're looking for is

4   whether the default itself is attributable to Maples.

5   The New York -- what -- what the out-of-State attorneys

6   did is they left the representation without fulfilling

7   their duty to notify the court or Mr. Maples. Mr.

8   Maples was sitting in a prison cell in Alabama under the

9   reasonable belief that he was represented by counsel who

10   would appeal if an adverse decision was issued.

11   JUSTICE SCALIA: Mr. Garre, can I go back to

12   Justice Kennedy's question? This was not an appeal.

13   The question was how many capital cases is there no

14   appeal. He had been convicted and had appealed, right?

15   The -- this is --

16   MR. GARRE: The direct proceedings had

17   concluded.

18   JUSTICE SCALIA: The direct proceedings were

19   over. He had appealed up to -- up to the State supreme

20   court. Did he seek cert here, too?

21   MR. GARRE: He did, Justice Scalia.

22   JUSTICE SCALIA: He did. And this was a

23   postconviction --

24   MR. GARRE: It was, but when the State sets

25   up that system and allows for appeals, it can't

1   arbitrarily deprive him of an appeal based on the sort

2   of circumstances here.

3   JUSTICE SCALIA: That may be, but I don't

4   think it's extraordinary that there be no appeal, I

5   mean, postconviction.

6   MR. GARRE: I'm not aware of any State that

7   does not allow appeal in postconviction proceedings.

8   JUSTICE SCALIA: It can be allowed, but it

9   would not seem to me extraordinary that it not be

10   sought.

11   MR. GARRE: At this point --

12   JUSTICE KENNEDY: Well, in -- in this -- in

13   this case, there was a direct appeal, and then there was

14   this proceeding that we're talking about here. The

15   trial judge waited for 18 months. So, you would think

16   there's some merit to the underlying claim. Any

17   statistics on whether or not -- on how often an appeal

18   is abandoned or not pursued in this kind of case? No

19   statistics?

20   MR. GARRE: No. I mean, the statistics that

21   I'm aware of are that habeas claims are in a material

22   sense often successful in capital cases. We've cited

23   those in our reply brief. Here we think the underlying

24   claims are quite serious. The question in the case is

25   really not who shot the victims. The question was

1   whether Mr. Maples was going to be convicted for capital

2   murder or murder that would result in life imprisonment.

3   JUSTICE KENNEDY: I'm -- I'm aware of the

4   allegations.

5   MR. GARRE: And I think, going back to the

6   court's and the clerk's actions here, one of the things

7   that exacerbated the chain of events here was that you

8   had an order which directed that all parties would be

9   served. Mr. Butler did say that he saw that that order

10   directed that the out-of-State counsel would be served,

11   which created an added risk of the likelihood --

12   JUSTICE SOTOMAYOR: Mr. Garre, I have two

13   questions for you. Is that -- is this State the only

14   one that doesn't appoint counsel in a postconviction

15   capital case?

16   MR. GARRE: Well, I believe that Alabama may

17   appoint them. They don't provide for appointment in all

18   cases. I believe Georgia is another State. But in that

19   respect, I think --

20   JUSTICE SOTOMAYOR: But the vast majority

21   do?

22   MR. GARRE: Absolutely.

23   JUSTICE SOTOMAYOR: In capital cases?

24   MR. GARRE: The vast majority do.

25   JUSTICE SOTOMAYOR: All right. Number two,

1   I thought there were two questions in this -- in this

2   part of your case. The first is, don't we have to

3   decide that abandonment, which you have termed, is

4   cause --

5   MR. GARRE: Yes.

6   JUSTICE SOTOMAYOR: -- in a -- to excuse a

7   procedural bar in a State court.

8   MR. GARRE: Right. And that is --

9   JUSTICE SOTOMAYOR: So we have to decide

10   first whether we extend Holland to this setting.

11   MR. GARRE: Well, I think they're

12   independent grounds. If the Court concludes that the

13   State's own actions --

14   JUSTICE SOTOMAYOR: That's the due process.

15   I'm talking about -- yes, both we would have to decide.

16   But assuming -- we have to decide the first question.

17   Is --

18   MR. GARRE: Well --

19   JUSTICE SOTOMAYOR: Will we extend Holland

20   to this type of situation?

21   MR. GARRE: I don't -- I don't -- I just

22   want to be clear on this. There are independent

23   grounds. If the Court concludes that the State's

24   action --

25   JUSTICE SOTOMAYOR: Yes, I -- I understand.

1   MR. GARRE: But with respect to the

2   attorneys, that's right.

3   JUSTICE SOTOMAYOR: Yes.

4   JUSTICE ALITO: Could we find --

5   JUSTICE SCALIA: What -- what is the line,

6   Mr. Garre, between abandonment and just plain old

7   negligence?

8   MR. GARRE: It would be the line established

9   by agency law going back to Justice Story's time.

10   JUSTICE SCALIA: So, if his local counsel

11   simply goofed in not -- not advising the people that

12   were doing the legwork in the case, why -- why is that

13   abandonment?   `

14   MR. GARRE: I think it's actually more of a

15   situation where he disclaimed any meaningful role at the

16   outset. I think, you know, the real abandonment going

17   on here was the attorneys in New York who left without

18   notifying the court or their client. But that --

19   JUSTICE ALITO: Well, putting aside the

20   question of local counsel, could we find that there was

21   an abandonment if the law firm of Sullivan & Cromwell

22   continued to represent Mr. Maples after the two young

23   attorneys left the firm?

24   MR. GARRE: The Court could.

25   JUSTICE ALITO: And does the record show

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1 that they -- they did not represent Mr. Maples, that

2 this was done purely by the two attorneys? Is there a

3 finding by a court on that?

4   MR. GARRE: There's not a finding. We think

5 that's the better reading of the record, and I'm happy

6 to explain why. But most importantly, we think it's

7 irrelevant whether he was represented by the law firm in

8 the fictional sense. He was represented by individual

9 lawyers in that proceeding. They were the ones who Mr.

10 Maples agreed to have represent him in that proceeding.

11 The Alabama courts made specific findings that Mr.

12 Maples's lawyers were Ms. Ingen-Housz and Mr. Munanka.

13 It said that after the default. At that time --

14   JUSTICE GINSBURG: But in the -- in the

15 practice of a law firm, these were very junior people.

16 Wouldn't the law firm have to have some involvement in

17 giving them permission to provide this representation?

18 I mean, usually there's something like a pro bono

19 committee and a higher level. Can -- can such junior

20 associates just go ahead and say, we want to spend a lot

21 of our time defending a man on death row? Wouldn't they

22 have to get some kind of permission?

23   MR. GARRE: I think one would ordinarily

24 expect that. And we're not condoning the actions here.

25 I would say that, at the outset of this litigation,

 1   there were individuals from the Legal Aid Society who

 2   were well familiar with capital cases involved. They

 3   apparently dropped out of the case. But we know --

 4   JUSTICE KAGAN: Well, what do we know about

 5   Mr. De Leeuw's role, Mr. Garre?

 6   MR. GARRE: What we know is what Mr. De

 7   Leeuw has said, which is that he was involved in the

 8   case at some point. It's not clear what his involvement

 9   was. At the oral argument in the Eleventh Circuit, he

10   said, on page 302 of the joint appendix, that he was --

11   they were awaiting further action from the court. So,

12   we don't know what his involvement was.

13   JUSTICE SOTOMAYOR: Mr. Garre, we don't

14   know, we don't know. Isn't that just proof that if we

15   were to find that Holland applied, the Holland exception

16   applied, that we would have to remand this case?

17   MR. GARRE: I think that would be

18   appropriate, Your Honor. Of course, we think the Court

19   should find that the Holland -- the Holland exception,

20   or more particularly --

21   JUSTICE SOTOMAYOR: In that regard, there is

22   one part of Holland that you don't really address, which

23   is that Holland contrasted a statute of limitations

24   issue with respect to access to a Federal court with a

25   procedural bar and said that the State's procedural bar

                                  24

1 had interest of federalism, that we had to be cautious

2 of ignoring a State procedural bar because of

3 federalism. If we were to extend Holland in the way you

4 want, how do we justify ignoring federalism in that

5 situation?

6   MR. GARRE: That's right. There are those

7 distinctions.

8   Our point is that Holland recognizes that

9 attorney conduct that amounts to abandonment is external

10 to the client under agency and other principles.

11 Coleman itself recognizes that external conduct is not

12 attributable to the client and can't be a basis for

13 cause.

14   So, the federalism interests are simply not

15 implicated in the case where you find that the

16 attorney's actions are external. And we think if you

17 look at the principles you looked at in Holland, agency

18 law going back to Justice Story's time, the principles

19 of professional standards of care, you would find that

20 an abandonment -- of course, that must be external to

21 the client. Justice Alito said in his concurring

22 opinion that where someone is not acting as an agent in

23 any meaningful sense, it would be grossly inequitable

24 and unfair to attribute the agent's conduct to the

25 client.

25

1   JUSTICE KAGAN: Mr. Garre --

2   MR. GARRE: That's the principle we're

3   asking here.

4   JUSTICE KAGAN: Could we go back to the

5   state of the record? You've said a few times, and your

6   brief does, that the record is skimpy on various

7   important matters. Would you go further and say that

8   the record is irretrievably corrupted, tainted by

9   conflicts of interest?

10   MR. GARRE: I think there are conflicts of

11   interest here. They're laid out in the legal ethics

12   brief. The Sullivan & Cromwell attorneys were

13   representing Mr. Maples up through the argument, the

14   decision in the Eleventh Circuit. But I think -- for

15   purposes of what this Court would do, I think a remand

16   would be appropriate, because if you conclude, as we

17   think you should, that abandonment of counsel would be

18   an external factor, then it would be appropriate to

19   remand for further proceeding. We don't know what these

20   other attorneys were doing. The record doesn't show

21   that.

22   JUSTICE GINSBURG: We do know, though, is

23   that they were not counsel of record.

24   MR. GARRE: We absolutely know that they

25   were not.

1   JUSTICE GINSBURG: So, we know that the two

2   who were listed as counsel of record --

3   MR. GARRE: They were not.

4   JUSTICE GINSBURG: -- were not representing

5   him, and they hadn't told the court.

6   MR. GARRE: They were not counsel of record.

7   Mr. Maples never agreed to have anyone else represent

8   him in a way that could bind him. The Alabama court

9   specifically found not only that they weren't counsel of

10 record, but they were not authorized to practice in

11 Alabama. This is on page 223 of the petition appendix.

12   JUSTICE SCALIA: But it seems to me it's up

13 to you to produce the facts that would justify our

14 reversing the case that you're asking us to do.

15   MR. GARRE: We asked --

16   JUSTICE SCALIA: And you say, well, we don't

17 have these facts; well, send -- send it back so I can --

18 no, you should have gotten the facts in the first place.

19 If the record doesn't show the things that you need to

20 show to get this case reversed, the case should not be

21 reversed, it seems to me.

22   MR. GARRE: But the petition did include a

23 request for an evidentiary hearing. And I think the

24 problem is that both the district court and the court of

25 appeals short-circuited the inquiry into counsel's

27

1 actions because it believed that Coleman v. Thompson

2 applied in the abandonment situation. And where a court

3 made that kind of legal error, it would be appropriate

4 for the Court to send it back and say, no, Coleman v.

5 Thompson does not apply in extraordinary cases of

6 abandonment, or an attorney's actions cannot be

7 attributable to a client under agency law.

8   JUSTICE SCALIA: When did you first make the

9 abandonment claim?

10   MR. GARRE: Well, I think we've argued --

11   JUSTICE SCALIA: When was it? Wasn't it

12 first made in the -- in the request for rehearing?

13   MR. GARRE: I think explicitly. Now, we

14 think -- two points on this. We think --

15   JUSTICE SCALIA: That's rather late.

16   MR. GARRE: We think that all along they

17 argued that the attorneys' actions established cause.

18 That's why both the district court and the court of

19 appeals addressed that and rejected it erroneously under

20 Coleman. That --

21   JUSTICE SCALIA: That isn't abandonment.

22 That isn't abandonment. The attorneys' actions

23 established cause; that does not mean abandonment to me.

24   MR. GARRE: We think this falls squarely

25 within the rule of Yee v. Escondido, where -- where the

28

1 party makes the claim below -- which they made the claim

2 here that the attorneys' actions established cause --

3 you can make new arguments, different arguments.

4   And I think, particularly given that

5 Sullivan & Cromwell had been involved early in this case

6 and the possibility of conflicts of interest would make

7 it appropriate for this Court to consider our

8 abandonment issue, which was raised in the petition for

9 rehearing, explicitly raised in the petition for

10 certiorari -- explicitly -- we think that it's properly

11 before this Court.

12   If there are no further questions at this

13 time, I'd like to reserve the remainder of our time.

14   CHIEF JUSTICE ROBERTS: Thank you, Mr.

15 Garre.

16   Mr. Neiman.

17   ORAL ARGUMENT OF JOHN C. NEIMAN, JR.,

18   ON BEHALF OF THE RESPONDENT

19   MR. NEIMAN: Thank you, Mr. Chief Justice,

20 and may it please the Court:

21   In trying to sidestep Coleman, Maples is

22 advocating at least three principles that are

23 incompatible with the way our justice system works.

24 First, Maples is asking this Court to hold that due

25 process required not just actual notice to his attorney

 1   of record, John Butler, but in fact something more than

 2   that.

 3   CHIEF JUSTICE ROBERTS: Let's say the three

 4   notices are sent out; all three of them come back, okay?

 5   Let's even go further and say the prosecutor knows that

 6   nobody representing Mr. Maples received notice. What

 7   happens then?

 8   MR. NEIMAN: In that case, Your Honor, there

 9   would be a much more substantial argument --

10   CHIEF JUSTICE ROBERTS: Yeah, I know it

11   would be more substantial. That's why --

12   (Laughter.)

13   CHIEF JUSTICE ROBERTS: My question is what

14   happens? Are you prepared to acknowledge that in that

15   case, Mr. Maples had been abandoned by all of his

16   lawyers, it was known to the prosecution, and,

17   therefore, the failure to file the notice should not

18   constitute an adequate and independent State ground

19   barring collateral relief?

20   MR. NEIMAN: I don't think that the return

21   of all three notices would justify necessarily a finding

22   of abandonment in toto by all the lawyers. It could

23   signify a number of things. I do think that it would

24   raise questions about whether the clerk had a due

25   process obligation to do more under Jones v. Flowers.

1   JUSTICE SCALIA: What does the return mean

2 when you get -- get a notice returned? It just said no

3 longer at Sullivan & Cromwell, is what the two of them

4 said, right?

5   MR. NEIMAN: Yes, Your Honor.

6   JUSTICE SCALIA: Does that necessarily mean

7 that they've abandoned the case? It just means you got

8 the wrong address, doesn't it?

9   MR. NEIMAN: That's correct, Your Honor.

10   JUSTICE SCALIA: Isn't that the only thing

11 it means for sure, these lawyers are no longer here at

12 Sullivan & Cromwell?

13   MR. NEIMAN: Yes, Your Honor.

14   JUSTICE SCALIA: I don't know how that would

15 be an indication of abandonment. Can't you switch a law

16 firm and keep the client?

17   MR. NEIMAN: Absolutely, Your Honor,

18 although the presumption generally is that the client

19 stays with the firm. But that's correct. The client

20 certainly can move firms when the -- when the lawyer

21 moves firms.

22   JUSTICE GINSBURG: Mr. Neiman, I think we're

23 blurring two issues. We're not talking about

24 abandonment in this respect. We're talking about notice

25 going to no one, and the -- and the clock ticking from a

 1 certain date that no one knows about.

 2   They were preparing for a hearing before

 3 this judge. So they weren't anticipating that he was

 4 going to rule without anything further.

 5   MR. NEIMAN: That's correct, Your Honor.

 6 They certainly were preparing for an evidentiary

 7 hearing, and, in fact, contrary to my friend's

 8 statements about what we know about Mr. De Leeuw's

 9 involvement in this case, on page 228 of the J.A.,

10 Maples expressly alleged that De Leeuw and others at

11 Sullivan & Cromwell were preparing for the evidentiary

12 hearing. But --

13   JUSTICE GINSBURG: But as far as -- as far

14 the record shows, De Leeuw was not on the record at all.

15 There were three counsel of record. Two of them --

16 well, let's go back to this -- this -- the first issue.

17 The State by its own conduct showed it didn't regard

18 Butler as any kind of representative, because it didn't

19 even send its Rule 32 response to Butler; isn't that so?

20   MR. NEIMAN: No, Your Honor, I respectfully

21 disagree with that assessment of how we can read the

22 service of the Rule 32 answer. Under Alabama law, a --

23 a pleading or an order may be served on only one counsel

24 of record when a party has multiple counsel of record.

25 So, for example, that answer was served upon Mr. Munanka

1   at Sullivan & Cromwell, but it was not served, expressly

2   at least, on --

3   JUSTICE GINSBURG: What about --

4   MR. NEIMAN: -- Ms. Ingen-Housz.

5   JUSTICE GINSBURG: What about the notice

6   that he had -- he had lost in the Alabama court and he'd

7   better, if he wants to go to Federal court, do something

8   about it? That notice went only to Maples, right?

9   MR. NEIMAN: That's correct, Your Honor.

10   The -- the State's attorney in that -- in that instance

11   decided to send a letter only to Mr. Maples. Of

12   course --

13   JUSTICE GINSBURG: And Mr. Garre made the

14   point that if Maples were represented, that that would

15   be improper, to -- to send a notice to Maples alone.

16   So, the -- so, the State's attorney must have thought

17   that Maples had been abandoned by his lawyers because he

18   didn't notify any of them.

19   MR. NEIMAN: Your Honor, the record does not

20   reveal why Mr. Hayden decided to send the letter to Mr.

21   Maples alone. One --

22   JUSTICE SCALIA: Of course, he didn't have

23   to send the letter. That letter had no legal effect,

24   did it?

25   MR. NEIMAN: That's correct, Your Honor.

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1   JUSTICE SCALIA: I mean, it was just: By

2   the way, your time has expired. I mean, this is not --

3   what could the lawyer do about it?

4   MR. NEIMAN: Well --

5   JUSTICE SCALIA: It wasn't a required notice

6   that he had to give to the lawyer or to anybody else.

7   MR. NEIMAN: That's correct, Your Honor.

8   JUSTICE SCALIA: So he just made this

9   extraneous, volunteered statement to Maples instead of

10   to his lawyer. I don't -- I don't know what that

11   proves.

12   MR. NEIMAN: At that point in time, the

13   State case was over. So, it was hardly clear if Mr.

14   Hayden was going to do something that he didn't have to

15   do under the rules.

16   CHIEF JUSTICE ROBERTS: Why did he do it?

17   Why did he do it, then? Just gloating that -- that the

18   fellow had lost?

19   (Laughter.)

20   CHIEF JUSTICE ROBERTS: What was the point

21   of it? He must have thought there was a problem, right?

22   MR. NEIMAN: Your Honor, he certainly was

23   aware that Mr. Maples's lawyers had failed to file a

24   notice of appeal. But -- and his letter reveals that he

25   is very aware --

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1   JUSTICE SOTOMAYOR: Is that surprising? I

2   think Justice Kennedy asked your adversary: How often

3   do appeals lie from the denial of State postconviction

4   remedies?

5   MR. NEIMAN: Your Honor, I agree with my

6   friend that we don't have statistics on that front. I

7   think it's fair to assume that, for the most part, when

8   a Rule 32 petitioner loses at the trial stage, they're

9   going to appeal.

10   JUSTICE SOTOMAYOR: In a capital case.

11   JUSTICE KENNEDY: Particularly in a -- in a

12   capital case.

13   MR. NEIMAN: That's correct, Your Honor,

14   although there are some instances in which a capital

15   petitioner or someone on death row decides that they no

16   longer want to invoke the process of the courts, and

17   they're ready for their sentence to be carried out.

18   JUSTICE KENNEDY: I just have two questions

19   going back to the very beginning, when we were talking

20   about the misaddressed or the unreceived mail. When the

21   notices come back "no longer at Sullivan & Cromwell,"

22   that's just as if it said, functionally, don't you

23   think, "wrong address"?

24   MR. NEIMAN: Not quite, Your Honor. I think

25   that -- that the notice saying that the person's no

                              35

1   longer at Sullivan & Cromwell indicates that the person

2   is no longer at the firm. I guess the notice could come

3   back --

4   JUSTICE KENNEDY: I mean, it's pretty clear

5   that they didn't get their -- get the mail, get the

6   letter, because it's sent back.

7   MR. NEIMAN: That's correct, Your Honor.

8   JUSTICE KENNEDY: One other thing while I'm

9   talking with you, and it's a tangential point, perhaps.

10   Could the State of Alabama under your laws waive what

11   you allege to be the procedural default? If you thought

12   there was substantial merit to the underlying claims,

13   even though you take the position that they ultimately

14   should be rejected, could you have simply waived the

15   procedural default and allowed the appeal to proceed?

16   MR. NEIMAN: I don't think the law makes

17   that crystal clear, Your Honor. But I certainly know of

18   no law that suggests that the Attorney General of

19   Alabama necessarily has to assert every single potential

20   defense within his or her arsenal.

21   JUSTICE KENNEDY: Has Alabama ever waived

22   lack of timely appeal in a capital case?

23   MR. NEIMAN: I'm not aware, Your Honor.

24   JUSTICE SOTOMAYOR: Counsel, could we go

25   back to the Chief Justice's initial question? Let's

 1   assume the two letters went to Sullivan & Cromwell and

 2   came back "left firm," as they did, and that the letter

 3   to Butler came back "deceased." Would there be cause in

 4   that situation to excuse the State's procedural ground?

 5   MR. NEIMAN: Perhaps, Your Honor. It -- it

 6   would depend on why the letters came back from Sullivan

 7   & Cromwell, I suppose.

 8   JUSTICE SOTOMAYOR: Well, we -- we know that

 9   the -- that both lawyers in this case didn't move to

10   another firm. Both of them took jobs that precluded

11   them from representing this defendant. So, I don't know

12   how I define abandonment other than I take a job where I

13   can't work for you anymore.

14   MR. NEIMAN: The -- the cause argument in

15   that case, Your Honor, would be substantially stronger,

16   as I said before, in part because death, of course, is

17   an external factor. So --

18   CHIEF JUSTICE ROBERTS: So, you accept -- I

19   don't mean to interfere with the question, but -- so,

20   you accept the idea that there is a distinction between

21   malfeasance and abandonment.

22   MR. NEIMAN: Your Honor, I think we'd be

23   prepared to recognize that, in certain cases, an

24   abandonment of a client by an attorney would terminate

25   the agency relationship with -- between the attorney and

                              37

1 client. And --

2   CHIEF JUSTICE ROBERTS: Okay. So, then the

3 only thing -- the only thing we're talking about is

4 whether, on these particular facts, there has been

5 abandonment or not. Right?

6   MR. NEIMAN: That's correct, Your Honor.

7   CHIEF JUSTICE ROBERTS: From your

8 perspective.

9   MR. NEIMAN: Yes, Your Honor. But one thing

10 I want to stress is that my friend has suggested that an

11 evidentiary hearing or further evidentiary proceedings

12 are necessary on this particular question because we

13 don't know what role the other attorneys at Sullivan &

14 Cromwell played in the matter.

15   JUSTICE GINSBURG: But we do know they

16 weren't counsel of record. We do know that the only two

17 counsel of record were no longer representing him, and

18 he had no reason to know that they weren't, but they

19 were not -- they couldn't represent him.

20   The two -- the only two out-of-town counsel

21 were the two who disabled themselves from representing

22 him by taking other jobs.

23   MR. NEIMAN: Your Honor --

24   JUSTICE GINSBURG: So, there was no one from

25 Sullivan & Cromwell other than those two on the record.

1   So, on the record, they had abandoned him, and there was

2   no substitute.

3   MR. NEIMAN: I disagree with that

4   assessment, Your Honor.

5   JUSTICE SCALIA: Well, the argument is that

6   on the record or not is determinative for the out-of-

7   town counsel, but it is not determinative for the

8   in-town counsel. The fact that he is counsel of record

9   doesn't count, but the fact that those two are does

10   count. And only when you combine those two does the man

11   have no counsel. Right?

12   MR. NEIMAN: Yes, Your Honor. There is that

13   inconsistency in Maples's argument. On the one hand,

14   Maples says that Butler -- or that the other lawyers at

15   Sullivan & Cromwell weren't his attorneys because they

16   weren't counsel of record. But Butler was counsel of

17   record, but he wasn't his attorneys.

18   JUSTICE KAGAN: The notice inquiry is

19   supposed to be a pragmatic one. As far back as Mullane,

20   we've said that the question that we're supposed to ask

21   ourselves is: Is this what somebody would do if they

22   actually wanted to accomplish notice, if they actually

23   wanted the person to get that letter? So, I'm just

24   going to ask you, General, if you were a lawyer in an

25   important litigation and you send off an important

 1   letter to two lawyers, your principal adversaries, as

 2   well as to a local counsel who you think may not be

 3   involved in the substance of the litigation, you don't

 4   know for a fact, but you think that there is some

 5   substantial likelihood that he's not particularly

 6   involved, as local counsel often aren't -- so, you send

 7   off this letter and you get it back from the principal

 8   attorneys, and you ask yourself: Huh, should I do

 9   anything now?

10   What would you say?

11   (Laughter.)

12   MR. NEIMAN: Your Honor, I suspect that, in

13   those circumstances, I might well personally do

14   something else. But, of course, my prerogatives as

15   Solicitor General of Alabama are quite different from

16   the prerogatives of a clerk in Morgan County, Alabama.

17   JUSTICE KAGAN: But the --

18   JUSTICE SCALIA: Whereas the clerk has to

19   believe that it's an important letter. Right? It's not

20   important enough to be required by the Federal rules.

21   How important is it?

22   JUSTICE KAGAN: Justice Scalia is right.

23   I'm assuming that a letter disposing of a -- of a ruling

24   in a capital case issued after 18 months when nobody

25   knew that that letter was coming, that that's an

                              40

1 important letter for a death row person to get. So,

2 Justice Scalia is right to that effect.

3   So, you get this, and you say, well, you

4 would have. But that's the question that we have to ask

5 about the clerk as well. The clerk -- the question for

6 the clerk is, if he had really wanted the person to get

7 notice, what would he have done?

8   MR. NEIMAN: No, Your Honor, I disagree.

9 The -- as far back as Mullane, this Court has said that

10 at the end of the day, actual notice to a party,

11 particularly within the jurisdiction, is the finish line

12 for due process purposes. Mullane expressly --

13   JUSTICE ALITO: You can see from these

14 questions that the arguments that you're making in this

15 capital case, which is sui generis, are pushing the

16 Court to consider rules that would have far-reaching

17 effect, such as a rule that places upon a clerk of the

18 court a constitutional obligation to serve counsel with

19 important documents in the case similar to the

20 constitutional obligation to serve initial process in

21 the case. And the question that I would like to ask is

22 whether this -- the -- whether you as the Solicitor

23 General or the Attorney General of Alabama have an

24 obligation to push this matter in this way. This is a

25 case where -- as I said, it's a capital case, as we all

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1   recognize. Mr. Maples has lost his right to appeal

2   through no fault of his own, through a series of very

3   unusual and unfortunate circumstances.

4   Now, when his attorneys moved to file an

5   out-of-time appeal, why wouldn't you just consent to

6   that? If he did not receive an effective assistance of

7   counsel at trial, why not get a decision on the merits

8   of that? Why push this -- this technical argument?

9   MR. NEIMAN: There are several responses,

10   Your Honor. First, at least at the Rule 32 stage, the

11   -- the notice of appeal deadline was a jurisdictional

12   one. And you're right, the State did oppose the motion

13   for an out-of-time appeal, but there wasn't much the

14   State could have done even if it had consented --

15   JUSTICE ALITO: There's no --

16   MR. NEIMAN: -- on that front.

17   JUSTICE ALITO: There's no possibility under

18   Alabama rules for an out-of-time appeal in this

19   circumstance? No extension?

20   MR. NEIMAN: The holding of the Alabama

21   courts here, as recognized by the Eleventh Circuit, was

22   that this would not be an appropriate circumstance for

23   an out-of-time appeal. Now, as to the question about --

24   JUSTICE ALITO: Is that a discretionary

25   matter or is that a flat rule, once you've passed a

1   certain time deadline, you're out of -- you're out of

2   luck; there's no opportunity where there's good cause

3   for an extension?

4   MR. NEIMAN: There is opportunity where

5   there's good cause for an extension. But what the court

6   held here, what the Alabama court held here, was that

7   this circumstance in which the person had counsel of

8   record, and counsel of record hadn't notified the court

9   of their address -- of their changes of address, and,

10   more importantly, Mr. Butler, who was, in fact, serving

11   as Mr. Maples's agent in this case and received --

12   JUSTICE KENNEDY: Well, this goes to my

13   earlier question, and continuing Justice Alito's line of

14   questioning. If the State of Alabama had told the State

15   court, in all of the circumstances, we think there

16   should be an out-of-time appeal granted -- you're -- are

17   you indicating that the State court said, well, that's a

18   good idea, but we can't do it because it's not

19   appropriate in these circumstances?

20   MR. NEIMAN: That seems to be the holding of

21   the Court of Criminal Appeals in this case, Your Honor.

22   JUSTICE GINSBURG: Did you -- did you oppose

23   it? Did the State oppose the out-of-time appeal?

24   MR. NEIMAN: Yes, Your Honor, the State did

25   oppose the out-of-time appeal, and the State pressed the

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1   procedural bar in Federal court in this case. But the

2   State had every prerogative to do so, in part because

3   this Court recognized in Coleman, a case where the

4   petitioner undoubtedly could have said that he lost his

5   right to his appeal through no fault of his own, that

6   the State had the power to do that. There are good

7   reasons for the State --

8   JUSTICE KENNEDY: Could the State in --

9   excuse me. Could the State in the -- in the Federal

10   litigation have waived the procedural default?

11   MR. NEIMAN: Your Honor, I think the law's

12   not exactly clear on that, but I know of no law that

13   would say that the Alabama Attorney General has to press

14   every single non-jurisdictional defense at his or her

15   disposal. But he did not do so here and had good reason

16   not to. That's in part because Coleman says that this

17   is how procedural defaults work. There are good reasons

18   for procedural defaults. They are grounded in the same

19   equitable principles that led --

20   CHIEF JUSTICE ROBERTS: But you agreed with

21   me earlier that abandonment is an exception to the

22   adequate and independent State grounds. So, under your

23   view of the case, Coleman was not necessarily

24   controlling.

25   MR. NEIMAN: Your Honor, if I suggested that

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1   abandonment itself is an exception to the AISG doctrine,

2   let me correct my earlier answer.

3   My suggestion is that abandonment can

4   sometimes allow a court to determine that a particular

5   lawyer has become external to a client, that the agency

6   relationship has been terminated. Of course, merely

7   becoming external to the client doesn't mean that the

8   abandonment itself will constitute cause. The

9   abandonment also -- or the lawyer's ending of the

10   relationship would also have to impede the ability of

11   the remaining members of the defense team or the

12   defendant himself to comply with State rules.

13   And here, even if there is some argument

14   that Ingen-Housz and Munanka abandoned their client,

15   which I don't think there is on this record in light of

16   the way they left the case with Butler, Mr. De Leeuw,

17   and others at Sullivan & Cromwell, even if there were

18   some argument on that front, Butler -- it's not clear

19   that the actions of Ingen-Housz and Munanka actually

20   impeded the ability of the remaining members of the team

21   to --

22   JUSTICE GINSBURG: When -- when lawyers stop

23   representing a client, as the two did, isn't there some

24   obligation of them to tell the client and the court,

25   we're no longer representing you, and arrange for

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1   substitutions? There were never any substitutions on

2   the record of the other counsel. The record says these

3   two people are representing -- they both -- and those

4   two weren't. They never told the court, and they never

5   told Maples. Isn't there some obligation on -- on their

6   part to the court when they stop representing a client

7   to advise the court?

8   MR. NEIMAN: Yes, Your Honor, I think there

9   is. But I don't think that means that what happened

10   here constitutes cause. The record is clear, as Mr.

11   Maples himself has alleged, that Ingen-Housz and Munanka

12   arranged for this case to be handled by Mr. De Leeuw,

13   and the record makes clear that Mr. De Leeuw was

14   involved in this case in representing Maples even before

15   the default occurred and even before Ingen-Housz and

16   Munanka were -- well, even -- even before Ingen-Housz

17   and Munanka left, I should say.

18   JUSTICE BREYER: Is it -- is it -- I'm still

19   unclear on one factual thing. Did the State's attorneys

20   know that the letters had come back?

21   MR. NEIMAN: Your Honor --

22   JUSTICE BREYER: Or should they have known?

23   MR. NEIMAN: Your Honor, the record is not

24   clear on that point. I can represent to the Court that

25   the State's attorney did not know that the letters had

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1   come back. I --

2   JUSTICE BREYER: Do they check the -- do

3   they check the docket every so often to see what's

4   happened?

5   MR. NEIMAN: Most -- most attorneys have an

6   obligation at some point to check the docket, and that's

7   -- that's one problem with the position that Mr. Maples

8   has taken regarding Mr. Butler here and the ability of

9   these parties to obtain information from the court.

10   But in this case, it's my understanding --

11   and this is not on the record. But it's on the record

12   obviously before this Court now. But it's my -- it's my

13   understanding that the State had no idea that Mr.

14   Maples's attorneys had not -- Mr. Maples's two attorneys

15   in New York had left their firm or had --

16   JUSTICE BREYER: Why did --

17   JUSTICE GINSBURG: Then why did they -- why

18   did they send to Maples alone the notice, you'd better

19   file your Federal habeas? They didn't send it to those

20   counsel. Where did they -- what made them send it --

21   send that notice directly to Maples and not to either of

22   the Sullivan & Cromwell lawyers?

23   MR. NEIMAN: Again, this is -- this is

24   information that's not in the record, Your Honor. But

25   it's my understanding that counsel looked at -- looked

                            47

1   at -- figured out what had happened, figured out the

2   appeal had been missed, had calculated how much time Mr.

3   Maples had to file his 2254 petition and, based on his

4   20 years of experience, said that in light of the fact

5   that the State court proceedings were over, the most

6   prudent thing for him to do would be to send the letter

7   to Maples himself.

8   JUSTICE SOTOMAYOR: So, he had figured out

9   that something had terminated the relationship between

10   Mr. Maples and his lawyers?

11   MR. NEIMAN: No, Your Honor, I don't think

12   that's -- I don't think that's an accurate

13   characterization of --

14   JUSTICE SCALIA: Well, even --

15   MR. NEIMAN: -- of what exactly happened in

16   this case, but in the very least, his lawyers had missed

17   -- had missed the deadline.

18   JUSTICE SCALIA: Even if you assume that he

19   had figured it out, that -- you would have to impute his

20   knowledge to the clerk of court to -- to find the -- the

21   fault on the part of the State that's alleged here.

22   MR. NEIMAN: Well, more so than that, Your

23   Honor.

24   JUSTICE SCALIA: Did he tell the clerk of

25   court that he was only going to send it to Maples?

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1   MR. NEIMAN: As far as I know, no, Your

2   Honor. But, of course, the cert -- the notice came back

3   to the clerk long before the State's attorneys sent the

4   letter in this case.

5   But that's an important point, I think, both

6   with respect to the clerk issue and also the abandonment

7   issue. The relevant question here is not what the

8   Assistant Attorney General of Alabama thought happened

9   in this case. The relevant question on the clerk issue

10   is what the clerk knew, and that of course is governed

11   by Rule 7 of the rules governing admission to the

12   Alabama bar.

13   The relevant question on abandonment is, had

14   Maples in fact been abandoned? Had -- had these

15   attorneys left him completely without counsel? And the

16   record definitively establishes that that had not

17   happened, both because Mr. Butler remained counsel here

18   and in a much more meaningful way, I think, than my

19   friend suggests. And --

20   JUSTICE SOTOMAYOR: Counsel, could you tell

21   me -- I'm assuming you've practiced in your State for a

22   while.

23   MR. NEIMAN: Yes, Your Honor.

24   JUSTICE SOTOMAYOR: How frequent is it in

25   the Alabama capital system that local counsel takes the

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1   laboring oar, or even an active participation, in the

2   defense or actions of a capital defendant?

3   Your -- the amici here says generally they

4   did what Mr. Butler did; they just facilitated the --

5   the admission of the volunteer attorneys. Was that your

6   experience?

7   MR. NEIMAN: Your Honor, of course, that

8   information's not in the record. We respectfully

9   disagree, as a factual matter, with the factual

10   assertions made by the amici on that front.

11   JUSTICE BREYER: All right. If we have to

12   send it back, I guess we'd have to say what the rule is.

13   So, what -- what is the rule? What about a rule that

14   says, where in fact attorneys do abandon the client and

15   the local attorney does as a matter of practice in the

16   State do virtually nothing except to facilitate foreign

17   representation, and where the State had cause to

18   believe -- cause to believe -- that all that was true,

19   then the State cannot assert this as an adequate ground.

20   That's all.

21   MR. NEIMAN: Your Honor, a remand would not

22   be appropriate in this case on those -- on grounds for a

23   number of reasons.

24   JUSTICE BREYER: Because?

25   MR. NEIMAN: One is that Rule 7 of the rules

1   governing admission to the Alabama bar made emphatically

2   clear that the role of local counsel was not simply --

3   JUSTICE BREYER: Irrespective of what the

4   rules were, you'd have to show that -- you would have to

5   show that, in fact, in the State it is a practice such

6   that the local counsel doesn't do much of anything

7   except facilitate, because this is a state of mind as to

8   whether the State -- and the State knows that.

9   If he shows both of those things and shows

10   that the letter came back and shows this was abandonment

11   or close thereto, then the State ought to know that this

12   individual had no idea about filing a piece of paper and

13   thinks somebody else is doing it. And that's enough to

14   say this is not adequate State ground that would block

15   Federal habeas. Now, your argument against that is

16   what?

17   MR. NEIMAN: At least twofold, Your Honor.

18   One, as a simple matter, those factual assertions were

19   not made below. So, in order for the Court to remand on

20   that particular issue, it wouldn't be a remand for an

21   evidentiary hearing, on whether those allegations --

22   JUSTICE BREYER: I've seen in the briefs.

23   There's certainly a lot in the briefs that seems to say

24   that.

25   MR. NEIMAN: There is certainly a lot in the

1   briefs that says that. But one problem Mr. Maples faces

2   here is that he had the burden as the petitioner in this

3   habeas proceeding to make the requisite factual

4   allegations that he believed would establish cause.

5   JUSTICE SCALIA: Mr. Neiman, am I correct

6   that under the Alabama rules when an attorney is

7   represented by more than one attorney, the notice does

8   not have to go to all of them?

9   MR. NEIMAN: That is correct, Your Honor.

10   JUSTICE SCALIA: It can only go to one,

11   right?

12   MR. NEIMAN: Yes, Your Honor.

13   JUSTICE SCALIA: So, as far as local counsel

14   knew, he was the only one to receive notice of this

15   thing, right?

16   MR. NEIMAN: That's correct, Your Honor.

17   CHIEF JUSTICE ROBERTS: Is it correct or

18   does the notice -- most of the notices I see list the

19   people who have been served. Were the New York people

20   listed on the notice that went to Butler?

21   MR. NEIMAN: Yes, Your Honor. The notice --

22   CHIEF JUSTICE ROBERTS: Well, then he knew

23   he wasn't the only one getting notice.

24   MR. NEIMAN: Right.

25   CHIEF JUSTICE ROBERTS: Or he knew that he

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1   was the only one who was supposed to get notice.

2   MR. NEIMAN: Well, the -- the cc line in

3   this case cannot establish cause and cannot be deemed

4   State interference for any number of reasons. The first

5   is that -- I suppose it could only be held to establish

6   cause if it would have been reasonable for Mr. Butler to

7   assume that the cc line communicated a message that it

8   was perfectly okay for him to do nothing and to not take

9   further action, based on what is on the cc line. And

10   there are at least three reasons why that would not be a

11   reasonable reading of the cc line.

12   The first is that the cc line doesn't

13   communicate that Ingen-Housz and Munanka, who were the

14   people listed on the cc line, will in fact receive the

15   order. All it says is that the order will be sent to

16   Ingen-Housz and Munanka.

17   The second is that the -- even if it would

18   have been reasonable for him, for Mr. Butler, to assume

19   that Ingen-Housz and Munanka would receive the -- the

20   order in this case, it would not have been reasonable

21   for him to have done nothing, given that Rule 7 of the

22   Alabama rules made him jointly and severally responsible

23   for -- to the client and to the court in this case.

24   JUSTICE SOTOMAYOR: I guess the problem is,

25   accept the rule; it exists. But if a lawyer says, I

1   don't care, I'm not going to do whatever the rules

2   require me to do, what more do you need for abandonment?

3   If a lawyer comes in and says, I understand

4   this is a rule of the court; I understand that I'm

5   supposed to do x, y, and z; I don't care; I'm just

6   not -- that's the question.

7   MR. NEIMAN: Yes, well --

8   JUSTICE SOTOMAYOR: What's the difference

9   between "I don't care" and abandonment?

10   MR. NEIMAN: I -- Your Honor, I guess I

11   should just make -- make a couple points in response to

12   that. First is that, as I understood the question posed

13   about the cc line, that is all about not abandonment,

14   but whether the clerk -- the clerk's actions can be

15   blamed for -- or the default be blamed on the clerk.

16   JUSTICE SOTOMAYOR: We're not talking about

17   the notice issue; we are talking about the abandonment

18   question.

19   MR. NEIMAN: On the abandonment question, if

20   it really were -- if it really is true that Butler had

21   decided he was going to do nothing in this case and not

22   represent his client and not be an attorney for the

23   client, then there might be a viable argument that

24   Butler was not -- was not -- had abandoned the client in

25   some way, but that is not the -- a reasonable reading of

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1   the record in this case.

2   JUSTICE SCALIA: If we find --

3   MR. NEIMAN: Butler --

4   JUSTICE SCALIA: If we find that these

5   lawyers did abandon their client, will there be some

6   sanction imposed upon them by the bar? I often wonder,

7   just as when we find that there's been inadequate

8   assistance of counsel in a capital case, does -- does

9   anything happen to the counsel who have been inadequate

10   in a capital case?

11   MR. NEIMAN: Your Honor, I suppose it would

12   depend on exactly what the allegations are --

13   JUSTICE SCALIA: Have you ever heard of

14   anything happening to them? Other than they're getting

15   another capital case?

16   (Laughter.)

17   MR. NEIMAN: Your Honor, I have not.

18   Certainly the rules provide that a breach of the rules

19   of professional responsibility would be sanctionable by

20   a State bar, both against the Alabama attorney here and

21   the New York attorney.

22   CHIEF JUSTICE ROBERTS: You said -- you said

23   a few moments ago that Butler did more than your friend

24   suggested. What more did he do?

25   MR. NEIMAN: Well, of course, we discussed

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1 in the brief the very -- the undisputable fact that

2 Butler filed numerous things, and after the default

3 occurred in this case. But even --

4   CHIEF JUSTICE ROBERTS: Well, after the

5 default, sure. But what did he do before?

6   MR. NEIMAN: Butler's affidavit certainly --

7 that was filed in the State court proceedings certainly

8 doesn't say: I'm -- I was in this only to swear these

9 people in or move for their admission and nothing else.

10   What Butler says --

11   CHIEF JUSTICE ROBERTS: What did he do more

12 than that?

13   MR. NEIMAN: Butler said -- says, on page

14 255a of the petition appendix, that he agreed to serve

15 as local counsel. "Local counsel" has a specified

16 meaning under Alabama law.

17   CHIEF JUSTICE ROBERTS: Well, you made a

18 fairly serious suggestion that your friend had not

19 accurately represented what Butler did. And you still

20 haven't told me one thing he did more than move the

21 admission of the out-of-town attorneys.

22   MR. NEIMAN: Well, let me withdraw any

23 suggestion that I am saying that Butler had in fact done

24 something that's -- that's clear on the record.

25   And my time is up. May I finish?

1   CHIEF JUSTICE ROBERTS: Sure.

2   MR. NEIMAN: The -- my point was that Butler

3 did not simply agree just to move these people -- move

4 these people's admission. Butler said he would be local

5 counsel. And local -- the role of local counsel is

6 defined by Rule 7. It includes an obligation to attend

7 hearings, conferences, and the like. It also --

8   CHIEF JUSTICE ROBERTS: Thank you, counsel.

9   Thank you.

10   Mr. Garre, you have 4 minutes remaining.

11   REBUTTAL ARGUMENT BY GREGORY G. GARRE

12   ON BEHALF OF THE PETITIONER

13   MR. GARRE: Thank you, Mr. Chief Justice.

14   We agree that this is a sue generis case.

15 The facts are extraordinary, the facts are shocking, and

16 our position is simply that under this Court's

17 precedents and the extraordinary facts here, Mr. Maples

18 has established cause to excuse the default.

19   With respect to local counsel, apart from

20 the fact that the State communicated directly with Mr.

21 Maples, an extraordinary step after the default, maybe

22 the other telling thing is that in 2006, Alabama itself

23 eliminated the local counsel requirement for pro bono

24 proceedings, recognizing that it could only create

25 problems; it didn't add anything.

1   With respect to abandonment, I understand

2   understood at times my counsel -- my friend, to

3   acknowledge that abandonment may establish an external

4   event with respect to the client. If that's so, then I

5   think it's clear that we're at a minimum entitled to a

6   remand. There were statements about what was clear from

7   the record. I think, at a minimum, the record is not

8   clear on a number of things that this Court would have

9   to get into if it were going to consider adopting the

10   State's position that Mr. Maples was not abandoned. Mr.

11   Maples was in a prison cell. His attorneys of record

12   did not tell him that they had left the firm. They were

13   required not only to tell the court --

14   JUSTICE SCALIA: We don't have to adopt the

15   State's position that he was not abandoned. We have to

16   adopt your position that he was abandoned.

17   MR. GARRE: And you have a record of the

18   attorneys leaving with not only not notifying Mr.

19   Maples, not notifying the court, and not obtaining the

20   court's approval, which is required by Rule 6.2 of the

21   Alabama Rules of Criminal Procedure.

22   JUSTICE ALITO: What is troubling to me

23   about the abandonment argument is that -- is the fear

24   that if the Court says that abandonment is cause, there

25   will be many, many cases in which the allegation is: My

1 attorney wasn't just ineffective and negligent; the

2 attorney was so bad that the attorney in effect

3 abandoned me.

4   And that will substantially change existing

5 law. Now, how can that be prevented?

6   MR. GARRE: Working through agency

7 principles that go back to Justice Story's time, working

8 through principles established in this Court's decision

9 in Holland and that will be applied in Holland. The

10 lower court in Holland issued its decision and found

11 that Mr. Collins had abandoned Mr. Holland, Using this

12 Court's precedent as a guide.

13   So I, think Holland already recognizes that

14 attorney abandonment can be extreme. Well, we're just

15 asking the Court to apply the same principles in

16 recognize that what's external in one context cannot be

17 not external in the other context.

18   JUSTICE SOTOMAYOR: Counsel, do you know how

19 often Holland's relief has been granted -- since it's

20 very recent, but how -- how frequently Holland's relief

21 has been granted by the courts below?

22   MR. GARRE: I don't know the answer to that

23 question. I'm not aware of any flood of relief in such

24 cases. I expect that this would be very extreme. I

25 think the facts here are about as extreme as you can --

1   you can get.

2   JUSTICE KAGAN: Mr. Garre, how do we

3   distinguish between abandonment and simply a botched, a

4   very botched, transfer of responsibility within a law

5   firm?

6   MR. GARRE: Well, where you have counsel of

7   record leaving without obtaining the approval that

8   they're required or telling the Court, I think that is

9   abandonment pure and simple. Beyond that, you would

10 look to agency principles, whether there's a breach of

11 loyalty. This is going to be a fact -- you would want

12 to get into the facts, although I think it is a very

13 high bar. I think the Holland decision makes clear it's

14 a high bar. I think this case thoroughly passes that

15 bar, but it's something that the courts will work out

16 applying agency principles and applying the Court's

17 decision in Holland.

18   Recognizing what Holland said in this case

19 isn't going to create any new rule; it's simply going to

20 extend logically the recognition that attorney

21 abandonment is external to the client as it always has

22 been under agency principles.

23   With respect to notice, this Court doesn't

24 have to find a constitutional violation on the State's

25 part. It's enough for cause that the Court find that

1   the State's actions are external. And I think the key

2   inquiry is what Justice Kagan recognized, which is you

3   look to what a person who is actually desirous of

4   providing notice would do. In this situation, the clerk

5   got two notices back, "Left Firm." It opened it up; it

6   would have seen an order in a capital case, and it did

7   nothing. I don't think anyone who actually desired to

8   provide notice of an inmate with his life on the line

9   would do nothing, reasonably, in that situation.

10   Mr. Maples is not asking to be released from

11 prison. He's asking for an opportunity to present a

12 serious constitutional claim of ineffective assistance

13 of counsel to a Federal habeas court on the merits.

14   If the claims are as meritless as they

15 suggest, that clearly will have little burden on it.

16 But simply allowing those claims to be adjudicated on

17 the merits in Federal court will go a long way to

18 preserve the legitimacy of the system of criminal

19 justice in a case in which a man's life is at stake.

20   Thank you.

21   CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Counsel.

23   The case is submitted.

24   (Whereupon, at 11:04 a.m., the case in the

25 above-entitled matter was submitted.)

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